Centre for Future Work

Submission to the

Secure Jobs Better Pay Review

29 November 2024

Introduction

The Secure Jobs Better Pay (SJBP) reforms were designed to address some areas where the industrial relations framework had not proven to be effective. The amendments were intended to improve and strengthen the operations of the Fair Work Act (FWA), including by increasing collective bargaining activity and coverage, improving job security and gender equality, and improving workplace conditions and protections.

While the full effect of the legislation is still to be seen, in general the operations of the SJBP Act have proven to be highly appropriate. However, in some areas, further changes are warranted to improve effectiveness, and to address unintended consequences.

Our submission addresses, at a broad level, the SJBP Act's impacts in relation to increasing collective bargaining, improving job security and gender equality, and improving workplace conditions and protections.[1] We also make observations and suggestions in relation to the appropriateness and effectiveness of some particular provisions and note some unintended consequences

The submission is organised as follows: first, we examine broad trends in collective bargaining and wage increases to consider the appropriateness and effectiveness of the *SJBP* reforms in removing barriers to collective bargaining and increasing wages. Then we briefly consider the need for improvements to increase the effectiveness of the multi-employer bargaining reforms. Following that we make some observations in relation to the gender equality reforms and job security reforms in the SJBP Act, including the provisions for limiting the use of fixed-term contracts. Finally, we consider some of the workplace conditions and protections amendments in SJBP Act focusing on the flexible working arrangements and sexual harassment amendments.

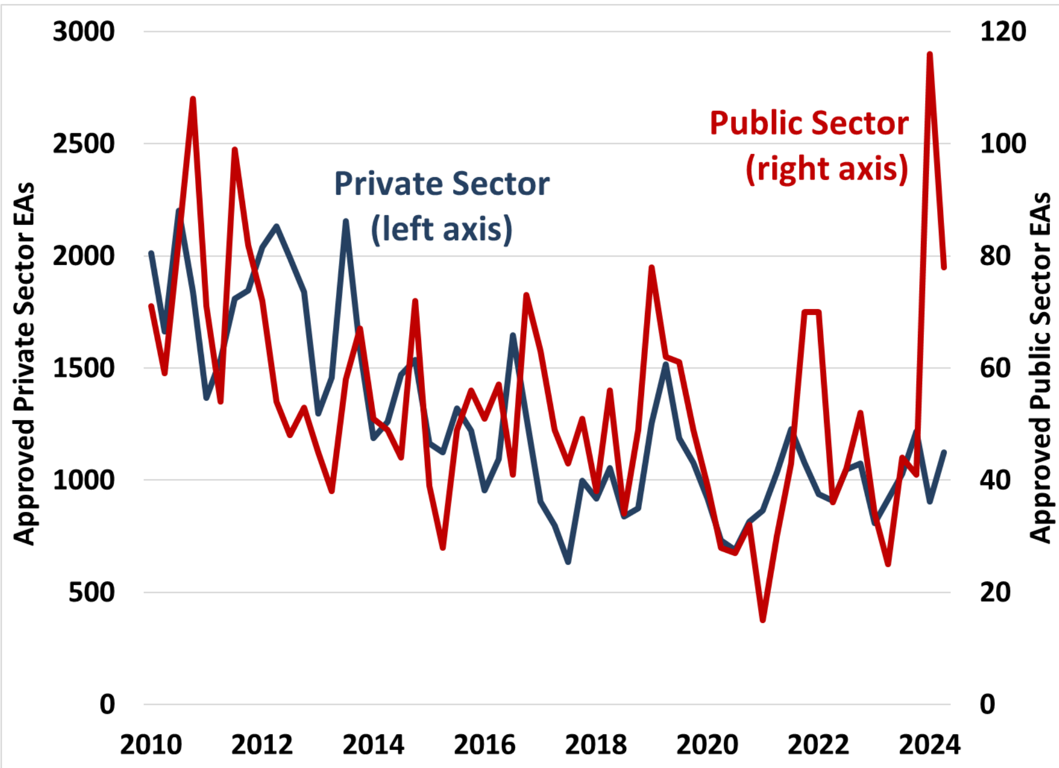
[1] House of Representatives (2022) Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 Explanatory Memorandum, Australian Parliament, Canberra.

Bargaining and wages growth

There are encouraging indications that the *Secure Jobs Better Pay* provisions, complemented by other industrial relations reforms, are supporting a recovery in collective bargaining activity in Australia. This recovery reverses a decade-long erosion of collective bargaining activity and coverage, dating back to 2013. Data on federally-registered enterprise bargaining[2] indicates a clear acceleration in coverage by new agreements, a more gradual recovery in overall coverage by current collective agreements, and a modest but welcome increase in average wage gains codified in those agreements.

Figure 1 illustrates a modest increase in the number of newly approved enterprise agreements in the federal industrial relations system since 2021, in both the private and public sectors (the data excludes enterprise agreements, mostly in the public sector, that are registered with state industrial relations authorities). In the last four quarters, a total of 4,573 agreements have been approved, the highest four-quarter total since the start of the COVID pandemic. This reverses a long-term decline in agreement-making dating back to 2013. Despite this improvement, the pace of agreement-making in the private sector remains well below that of the 2010-2015 period. In the public sector, however (where agreements are fewer but larger), the number of new agreements approved in the last year matches peak levels in the 2010-2012 period.

Figure 1. Newly Approved Enterprise Agreements, 2010-2024

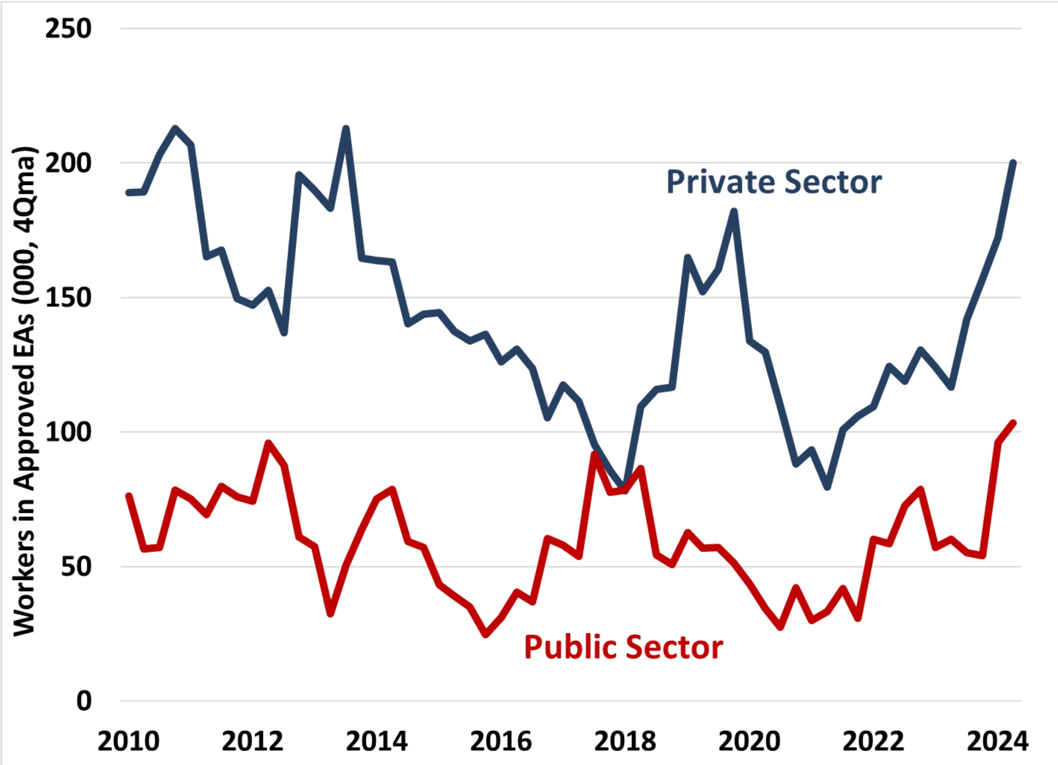


Source: Trends in Federal Enterprise Bargaining. Federally registered agreements only.

[2] Department of Employment and Workplace Relations (DEWR) (2024) Trends in Federal Enterprise Bargaining. June 2024, DEWR.

The average size of newly approved enterprise agreements has increased, alongside the number of new agreements. This combination produces a stronger rebound in the number of workers covered by newly approved agreements. Figure 2 illustrates the clear rebound in coverage of new agreements, for both the private and public sectors. Because these series are highly volatile, a four-quarter moving average is portrayed. In both the private and public sectors, the average number of workers covered by newly approved agreements over the past four quarters has regained peak levels not experienced since 2012-2013.

Figure 2. Workers Covered by Newly Approved Enterprise Agreements, 2010-2024



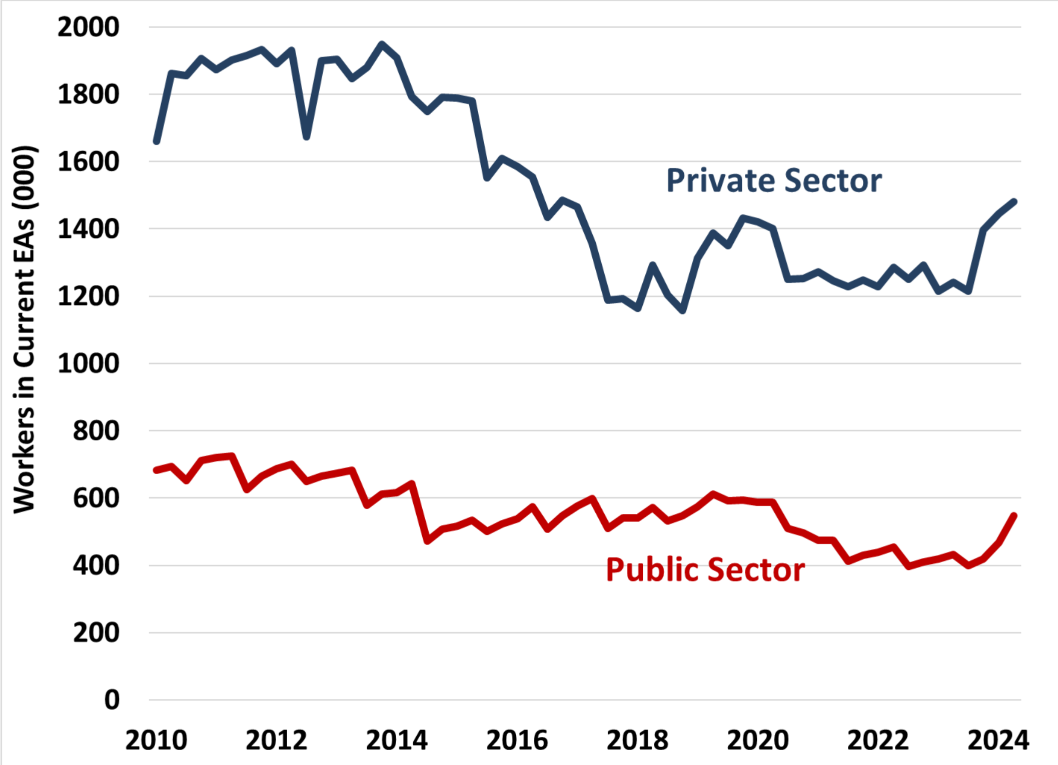
Source: Calculations from DEWR, Trends in Federal Enterprise Bargaining. Four-quarter moving average.

An average of over 200,000 workers per quarter were covered by newly approved agreements over the past 12 months in the private sector. And over 100,000 workers per quarter were covered by newly approved agreements over the past 12 months in the public sector. The sharpest increase in coverage of new agreements began in the third quarter of 2023, following the implementation of most of the *SJBP* reforms.

It takes time for changes in the flow of new agreements to impact the much larger stock of current agreements, but a gradual increase in overall coverage by current enterprise agreements is now becoming visible. Figure 3 illustrates overall coverage by current (within-term) agreements for both the private and public sectors.[3]

[3] Of course, there are many expired enterprise agreements still in effect past their term in Australian workplaces. Those agreements, however, do not normally provide for ongoing wage increases, and their impact on overall compensation and conditions is limited.

Figure 3. Workers Covered by Current Enterprise Agreements, 2010-2024



Source: DEWR, Trends in Federal Enterprise Bargaining.

In both sectors, there has been a distinct uptick in overall coverage of current agreements since mid-2023. In the private sector, coverage by current agreements has increased by 265,000 workers since the third quarter of 2023. In the public sector, coverage by current agreements has increased by over 130,000 workers in the same time. Private sector coverage is now higher than at any time since 2016. In both sectors, however, the cumulative impact of a decade of earlier decline in enterprise agreement coverage is still obvious, and will take years of enhanced negotiations to fully repair.

Of course, overall employment has increased in Australia during this time. When enterprise bargaining was eroding, the ongoing growth in employment produced a double-barrelled decline in the proportion of workers covered by current agreements. Workers covered by agreements declined because of both the fall in absolute coverage (the numerator) and ongoing growth in total employment (the denominator). This relative erosion of collective bargaining coverage will take some time to repair.

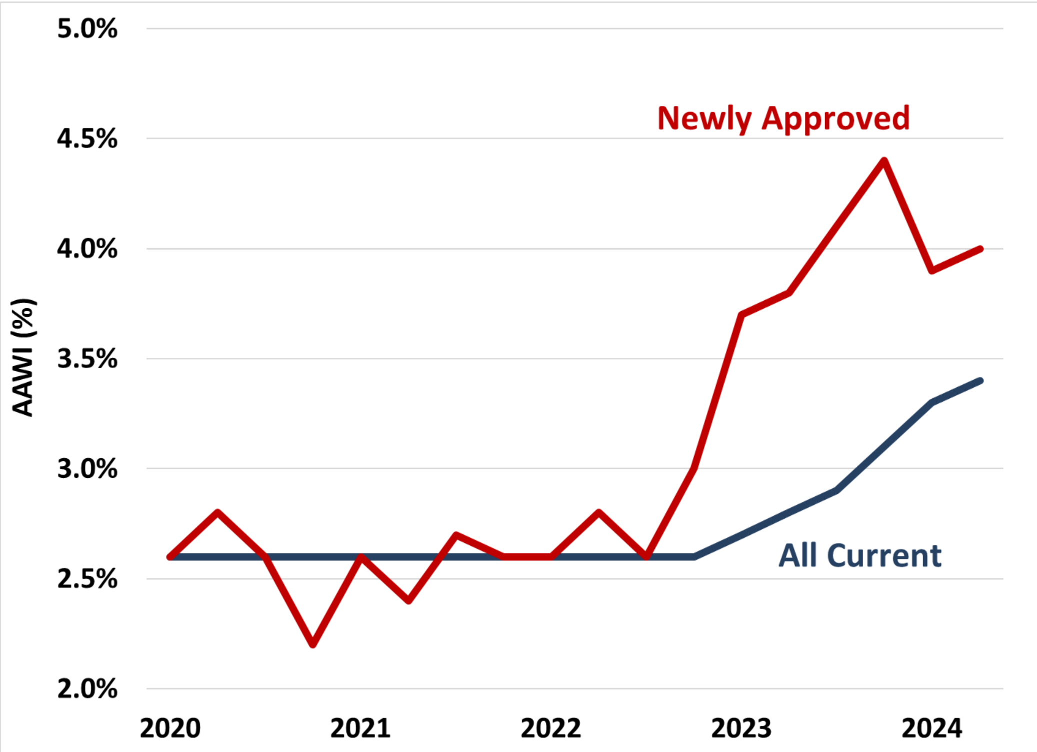
Nevertheless, the recent increase in new collective bargaining activity has been strong enough to provide a lift in the proportion of total waged employment covered by a current enterprise agreement. As of the June quarter of 2024, current enterprise agreements in the private sector covered 12.0% of all private sector employment – up from 10.1% at the beginning of 2023.[4] Coverage by federally registered public sector enterprise agreements rose to over 35% of total public sector

[4] Authors' calculations from Department of Employment and Workplace Relations (2024) Trends in Federal Enterprise Bargaining, June 2024, and Australian Bureau of Statistics (2024) Detailed Labour Force Statistics, June 2024, Table 26a.

employment by June 2024, up from under 25% in 2022.[5] Further reform is required to rebuild collective bargaining coverage, particularly in the private sector, but it is encouraging to see the long erosion in private sector bargaining coverage turn a corner.[6]

Stronger enterprise agreement coverage provides workers with enhanced bargaining power, and this is enabling them to achieve stronger wage outcomes. This has been vital in the effort to repair the real purchasing power of workers' wages after the impacts of faster post-COVID inflation. Figure 4 illustrates the average annualised wage increase (AAWI) in federally registered enterprise agreements. The figure indicates both the AAWI in newly approved agreements, and the AAWI in the stock of all current agreements. Again, it takes considerable time for a change in the pattern of newly negotiated agreements to be reflected in more gradual changes in the stock of all current agreements.

Figure 4. Average Annual Wage Increases in Enterprise Agreements, 2010-2024



Source: DEWR, Trends in Federal Enterprise Bargaining.

Average annual wage increases in newly approved agreements accelerated significantly in 2023 – from slightly above 2.5% in 2022 (the year of peak consumer price inflation) to around 4% by mid-2023. This acceleration in wage growth is being reflected gradually in improved AAWIs for the entire stock of current agreements. That average grew from slightly above 2.5% (where it languished for

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[5] A significant proportion of public sector employees are covered by enterprise agreements registered with state governments, which except for Victoria are not included in the data cited above.

[6] For more details on the dimensions, causes, and consequences of eroding private sector bargaining coverage, see Pennington, A (2018) *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector*, Centre for Future Work, Canberra. https://futurework.org.au/report/on-the-brink/.

years, even before the Covid pandemic), and is now approaching 3.5%. It will increase further in coming quarters as the faster pace of wage growth in newly approved agreements filters through the stock of all current agreements.

Combined with the deceleration of inflation in recent months, this faster pace of wage growth in newly approved enterprise agreements is finally leading to the rebuilding of real wages for workers covered by those agreements. This is a welcome change after the painful retrenchment in real incomes caused by the acceleration of inflation in Australia between 2021 and 2023.[7] Since the fourth quarter of 2023, AAWIs in newly approved agreements have exceeded the year-over-year growth in the consumer price increase, and hence real wages for workers covered by those agreements are growing. This trend will need to continue for several years, in order to lift the AAWI for all current agreements above inflation, and restore real wages for workers so badly damaged by the initial acceleration of inflation from mid-2021 through mid-2023.

The improvement in enterprise agreement coverage and AAWIs is making a crucial contribution to stronger wage growth across the broader labour market. New ABS data on the comparative pace of wage growth according to pay-setting method confirms that wage growth in the regulated sectors of the labour market (including both Modern Awards and enterprise agreements) has been superior to wage trends for workers covered by individual contracts. Wage growth has been stronger for workers covered by enterprise agreements and for Award-covered workers. This reflects the commitment by the Commonwealth government to boost wages through both those institutional mechanisms (stronger collective bargaining and higher Award wages). Again, this trend will need to continue for several years to repair the damage done by post-pandemic inflation. And workers currently employed under individual contracts will need to attain better access to the benefits of collective bargaining in order to fully share in this future wage recovery.

Table 1
Wage Increases by Pay-Setting Method
June 2023-September 2024

Pay-Setting Method	Cumulative Wage Growth
Awards	8.4%
Enterprise Agreements	5.6%
Individual Contracts	4.9%

Source: Calculations from ABS Wage Price Index, Appendix B.

In relation to whether the SJBP Act has had any unintended consequences, some business groups opposing the bargaining and other SJBP provisions argued that multi-employer bargaining would be harmful to Australia as it would decrease productivity.[8] We find no evidence of bargaining (or any other) reforms having had any negative impacts on productivity growth.

[7] Real wages in Australia (measured by the ABS Wage Price Index deflated by its Consumer Price Index) declined by over 5% between December 2019 (just before the pandemic) and June 2023.

[8] Ai Group (2022) Ai Group Statement to IR Bill Senate Hearing, Nov 15. https://www.aigroup.com.au https://www.aigroup.com.au/news/media-centre/2022/ai-group-statement-to-ir-bill-senate-hearing/

First, it must be noted it is not possible for any recent decline in productivity growth to be due to the bargaining provisions in the SJBP reforms as, in June 2024, there were only 118,300 employees on multi-employer agreements, just 5-6% of the 2.2 million employees on federal agreements and less than 1% of the total workforce.[9] In any case it would be mistaken to assume that higher wages will lead to lower productivity. Higher wages from increased bargaining could increase productivity if it encourages firms to introduce productivity-improving new technology.[10] Technology is the single biggest factor that shapes productivity.

According to the Productivity Commission's latest quarterly report, Australia's productivity growth has reverted to the stagnant pattern evident before the COVID pandemic.[11] However, as productivity growth is highly erratic, measures of short-term movements are not that helpful for providing information about productivity trends. Indeed, quarterly growth figures of productivity estimates are "constantly being revised".[12] Measures of growth averaged over a long period are a lot more meaningful.[13]

Over a longer period, productivity is falling in Australia and overseas. Here and internationally, the adoption of neoliberal reforms from the 1980s failed to improve productivity growth. In Australia, productivity growth has been on a long-term decline since the 1960s, with a brief, unsustained upturn in the mid-1990s. This pattern raises questions about the assumed links between big reforms in the past to competition policy, industrial relations and wage fixing that were aimed at improving productivity growth. There was no sustained growth following these reforms; rather, productivity continued to decline.

When we have experienced productivity gains, workers have not necessarily shared the benefits of these gains.[14] While higher labour productivity enables higher living standards it does not mean it necessarily will do so.[15] Workers still need to be able to bargain for higher wages.

SJBP bargaining amendments

While the SJBP reforms to bargaining and agreements have been effective in increasing collective bargaining coverage, further reforms are needed. There remain many barriers to collective bargaining including to the broader take-up of the SJBP multi-employer bargaining options by employees who are not currently benefitting from wage increases. For example, the Supported Bargaining stream arrangements exclude employers with an enterprise agreement that has not reached its expiry date. This unnecessarily limits the effectiveness of the Supported Bargaining reforms in lifting the wages of low-paid workers. Amendments that speed up the process of including such employers, for instance by allowing employers with single enterprise agreements to be included

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[9] Department of Employment and Workplace Relations (2024) Trends in Federal Enterprise Bargaining, June 2024, Table 6 and Australian Bureau of Statistics (2024) Detailed Labour Force Statistics, June 2024.
[10] Coviello, D et al (2022) What happens to worker productivity after a minimum wage increase? KelloggInsight, 1 December. https://insight.kellogg.northwestern.edu/article/worker-productivity-minimum-wage-increase
[11] Productivity Commission (2024) Quarterly Productivity Bulletin – September 2024, p. 2. https://www.pc.gov.au
[12] Productivity Commission (2024) Quarterly Productivity Bulletin – September 2024, p. 5.
[13] ABS (2009) Australian System of National Accounts, 2008-09, 5204.0 – Glossary: Productivity growth cycles https://www.abs.gov.au/
[14] OECD (2018), Decoupling of wages from productivity: what implications for public policies? in *OECD Economic Outlook, Volume 2018 Issue 2*, OECD Publishing, Paris.
[15] Haynes, P (2023) *Productivity***,** Cambridge University Press, online.

in authorisations immediately on expiry of their agreements, should be considered.[16] More generally, we encourage the Review Panel to address technical and other issues that are proving to limit the take-up of multi-employer and single enterprise agreements, undermining the effectiveness of the SJPB reforms.[17]

Gender equality

The focus in the SJBP Act on addressing gender inequality is both significant and necessary. SJBP amendments centre the promotion of gender equality in Australia's system of work relations laws for the first time. Critically, many of the amendments are directed to addressing the gender pay gap, including addressing gender-based undervaluation of work.[18] SJPB reforms include new expert FWC panels for pay equity and care & community sector matters, inclusion of gender equality in the FWA objects, prohibition of pay secrecy clauses, and reform of equal remuneration provisions. Australia's gender pay gap is 11.5% when measured as the difference between average full-time ordinary time weekly earnings of men and women workers.[19] Whilst incremental progress towards reducing the gender pay gap has occurred, it persists. A complex interplay of factors contribute to the gender pay gap, including a high level of gender segregation in the labour market, with women more highly concentrated in relatively low-paid award-dependent occupations and industries that have high rates of part-time and precarious employment. [20] Thus, addressing gender bias and gender-based undervaluation in awards and other employment instruments is important in eliminating the gender pay gap.

Discussed in more detail in Workplace Conditions and Protections section of this submission, the SJBP Act made changes to the FWA that are important for addressing gender inequality, including addressing sexual harassment and discrimination based on prescribed attributes. The right to request flexible working arrangements and to extend unpaid parental leave were strengthened to support better balancing of work and care.

Objects of the FWA

The FWA was amended by the SJBP Act to include the promotion of gender equality in the overarching objective of Australia's workplace laws.[21] This means that the FWC must consider gender equality in all its interventions and decisions. SJBP amendments to the Minimum Wages and Modern

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[16] Charlesworth, S & Macdonald, F (2023) Collective bargaining and low-paid women workers: The promise of supported bargaining, *Journal of Industrial Relations* 65(4) 403-418.
[17] See, for example Harrison L and Forsyth, A (2024) 18 Months of Multi-Employer Bargaining: A Work in Progress, paper presented at the Australian Labour Law Association national conference, Geelong, November 9-10.
[18] See *Fair Work Legislation Amendment (Secure Jobs Better Pay)Bill, 2022, Revised Explanatory Memorandum*, at [8-9].
[19] ABS (2024) Gender Indicators, May 2024, https://www.abs.gov.au. Other measure of the gender pay gap suggest a much larger gap. For example, the Workplace Gender Equality Agency (WGEA) provides an estimate of 21.8%, based on a comparison of the average total remuneration of employees in large organisations. See https://www.wgea.gov.au
[20] Austin, S., & Preston, A. (2024).*The Gender Pay Gap in Victoria: Measures, Trends and Intersections,* the UWA Profiles and Research Repository, p.10; KPMG 2022, *She's Price(d)less: The economics of the gender pay gap*, https://www.wgea.gov.au
[21] FWA s.3

Award objectives of the FWA require the FWC to take account of the need to achieve gender equality in wage setting and award matters.

The SJBP amendment to the Modern Awards Objective of the FWA is perhaps the most promising for achieving systemic change. Along with measures to address equal remuneration and undervaluation, this amendment could lead to modern award provisions that ensure part-time employment is treated equally to full-time employment and that facilitate a better balance between work and caring responsibilities (see discussion of 'Job Security' amendments later in this submission).

In the context of addressing gender-based undervaluation of work, the amendment to the Modern Award Objective is important as women, particularly those employed in female-dominated occupations, are more likely to be reliant on award safety net wages and conditions.[22] Effectively, the award sets both the minimum and maximum rate of pay for these workers. Potentially the FWC could use the amended objective to hold a wide-ranging inquiry into the many factors that have contributed to gender-based undervaluation of women's work in the past. For example, past decisions to reduce penalty rates in female dominated areas of employment have been shown to have had gendered effects.[23] Another benefit of the amendment is that it could provide the FWC with a mechanism to raise wages in female-dominated award areas across entire industries and occupations, addressing multiple awards at the one time. This would avoiding lengthy and costly award-by-award processes. However, to date the FWC has chosen not to opt for this type of approach.

FWC expert panels

Two new expert panels on Pay Equity and on Care and Community Services have been established to support the FWC. This is an appropriate and important reform that recognises the FWC's and its predecessors' "troubled" past in progressing equal remuneration matters and addressing gender-based undervaluation.[24] Already the benefits of the expert panels can be seen in the 2022-2023 Annual Wage Review. The expert panel made the significant observation that the federal tribunal may have contributed to the systemic gender-based undervaluation of work through its historical treatment of work in female-dominated awards.[25]

Equal remuneration and gender-based undervaluation

The history of decision making by the federal industrial relations tribunal in relation to equal remuneration and gender-based undervaluation is set out in a recent FWC report prepared for the 2023-2024 Annual Wage Review.[26] Criticism of the FWC and its predecessors has included that there has been inconsistency in framing of, and approaches to, addressing unequal remuneration and

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[22] Yuen, K & Tomlinson J, 2023, *A profile of employee characteristics across modern awards*: *Research Report 1/2023*, FWC, https://www.fwc.gov.au/documents/wage-reviews/2022-23/profile-of-employee-characteristics-across-modern-awards-2023-03-03.pdf

[23] Stanford, J (2017) *Economic Impacts of Reductions in Penalty Rates for Sunday & Holiday Work Testimony of Jim Stanford, Economist and Director before the Senate of Australia, Education and Employment References Committee Inquiry Into Penalty Rates*, Melbourne, August 24, https://futurework.org.au/

[24] Macdonald, F & Charlesworth (2013) '*Equal Pay under the Fair Work Act 2009 (Cth): Mainstreamed or Marginalised?'*[2013] UNSWLawJl 21; (2013) 36(2) UNSW Law Journal 563; Chapman, A, Gaze, B & Orifici, A (2017) Substantive equality at work: still elusive under Australia's Fair Work Act, *Australian Journal of Labour Law*, 30(3): 214-235.

[25] [2023] FWCFB 3500 at [133]

[26] FWC (2024) Stage 2 Report, *Gender Pay Equity Research Annual Wage Review 2023–24*, FWC.

gender undervaluation.[27] The FWA provisions for the making of equal remuneration orders (EROs)[28] were intended to remove barriers to achieving pay equity that arose from historical framing and decision making. However, the FWC's interpretation of these provisions did not overcome the problems.[29] The historical and technical approach taken by the FWC and previous tribunals has been contrasted with a broader approach to the problem using indicators of undervaluation, adopted in state jurisdictions including Queensland and New South Wales.[30] The SJBP Act amendments to Part 2-7 of the FWA provide that the FWC can initiate EROs of its own motion, a male comparator is not required and the FWC can consider a range of factors including whether work has been historically undervalued based on gender.[31] This is closer to the 'indicia' approach used in both Queensland and New South Wales jurisdictions.

The SJBP reforms provide much needed clarity as to how the legislature expects the FWC to consider the problem of gender-based undervaluation of work. The SJBP Act included a new subsection within s.157 related to how the FWC is to approach work value claims in modern awards. This provision requires that reconsideration of award rates on work value grounds must be "free of assumptions based on gender"' and "include consideration of whether historically the work has been undervalued because of assumptions based on gender".[32] The new s.157(2B) requirements clarify that there is no need to demonstrate a change in work value to justify an increase in rates of pay based on work value grounds. This is an important amendment as it allows for historical undervaluation to be addressed.

The amount and pace of activity within the FWC on issues of gender-based undervaluation is unprecedented, demonstrating the positive material impact of the SJBP Act reforms. The FWC has initiated a review, on work value grounds, of award classifications and minimum rates of pay in five priority awards, aiming to address these matters prior to the Annual Wage Review proceedings in 2025, so it can "move on to the consideration of any further gender undervaluation issues". [33] Further applications for changes to modern awards on work value grounds could be important as a method of improving wages in female-dominated areas of work in the future.

The gender equality measures contained in the SJBP Act have set the framework for change in both the FWC's framing of the valuing of work and its processes for assessing this value. The effectiveness of the SJBP amendments will become more apparent over the next year or so when decisions are

[27] Smith, M & Whitehouse, G (2020) Wage-setting and gender pay equality in Australia: Advances, retreats and future prospects. *Journal of Industrial Relations*, 62(4), 533-559; Smith, M, Layton, R, & Stewart, A (2017) Inclusion, reversal, or displacement: Classifying regulatory approaches to pay equity, *Comp. Lab. L. & Pol'y J.*, 39, 211.
[28] FWA Part 2-7.
[29] See *Re Equal Remuneration Decision 2015* (2015) 256 IR 362; [2015] FWCFB 820; see also Smith, M and Stewart, A (2017) Shall I Compare Thee to a Fitter and Turner? The Role of Comparators in Pay Equity Regulation, *AJLL* 30, 113.
[30] Macdonald, F & Charlesworth, S (2018) Failing to live up to the promise: The politics of equal pay in 'new' workplace and industrial relations institutions, *Australian Journal of Political Science*, 53(4), 446- 462.
[31] FWA s303(3)(a), s 302(3).
[32] FWA s157(2B)(a)&(b).
[33] The review: [2024]. FWCFB 280 *Annual Wage Review Decision 2023- 2024* [2024] FWCFB 3500 at [171].

made in relation to the current priority reviews and any immediate further action to be taken by the FWC on gender-based undervaluation is clear.

Gender inequality and gender-based undervaluation will not be eradicated by small incremental adjustments. Further amendments to the FWA could include a requirement that the FWC adopt a standard methodology and principles for classifying work and ascribing work value that breaks with historic reliance on standards in male-dominated industries.[34] With different approaches being used in different awards, the current FWC processes may produce limited guidance for future cases regarding how the FWC will address these matters. Further, additional amendments to the FWA could encourage the tribunal to move away from historical adversarial practice and adopt an approach that encourages the parties to collaborate to resolve historical gender-based undervaluation.

A final issue that may limit the effectiveness of the amendments is that the FWC may be conflating gender-based undervaluation with the provision of front-line care, ignoring how gender impacts on all those involved in highly female-dominated occupations and industries. This conflation is present in the FWC's decision making in the *Federal SACS Case*[35] and in the recent *Aged Care Case* where those workers not involved in front-line care received short shrift and lesser wage increases.[36] The FWC should be encouraged to adopt a broader view of gender-based undervaluation.

Pay secrecy

Lack of transparency around remuneration and employment conditions contributes to the gender pay gap.[37] The SJBP provisions are designed to increase transparency to prevent unjustified and discriminatory remuneration practices. The provisions outlaw pay secrecy clauses and provide a positive right for employees to share information about pay and conditions. This is an important strategy for addressing the gender pay gap, along with other strategies adopted by the Government, including strengthening employer reporting to the Workplace Gender Equality Act (WGE Act). It will take some time to assess how successful the pay secrecy provisions are. However, they address problems that are known to contribute to pay inequities within workplaces.[38] We welcome these changes as an important positive reform to reduce the gender pay gap.

Job security

The inclusion of job security in the FWA Object and in the Modern Awards Objective are important and appropriate amendments to the FWA, including that they require the FWC to focus on the

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[34] The FWC was invited to do this by the ACTU in the current *Gender Undervaluation – Priority Awards Review* but declined. See *Statement, Gender Undervaluation – Priority Awards; Social, Community, Home Care and Disability Services Industry Award 2010 – application for variation; Social, Community, Home Care and Disability Services Industry Award 2010 – application for variation [2024] FWCFB 334* (12 August 2024).

[35] *Equal Remuneration Case - May 2011 Decision*, [2011] FWAFB 2700

[36][2022] FWCFB 200; [2023] FWCFB 40

[37] See for example World Economic Forum (2023, *Explainer: What are Pay transparency Laws and are they Working*, WEF. https://www.weforum.org; OECD (2021*), Pay Transparency Tools to Close the Gender Wage Gap*, Paris, OECD Publishing.

[38] Tulik, C (2024) Why don't Australians talk about their salaries? Pay transparency and fairness go **hand-in-**hand*, The Conversation*. https://theconversation.com

significant problem of insecure work that undermines wages, conditions and job quality. The full effects of these amendments are still to be seen. In 2023 job security was included as one of four "streams" of a targeted review of modern awards undertaken by the FWC at the direction of the Minister.[39] The "key outcome" of the review is that the Commission will, on its own initiative, commence proceedings pursuant to ss 157(3)(a) and/or 160(2)(a) of the FW Act to deal with the priority matters identified in the report.[40] The FWC is starting six new cases on priority issues, some which include a focus on issues of job security. The matter of job security was highly contested in the FWC review and the cases proceeding in the FWC could have unintended consequences. A full evaluation of the SJBP job security amendments will be needed to assess the effectiveness of these amendments, with a view to strengthening provisions that address the problem of insecure work.

Limiting the use of fixed-term contracts

The *SJBP Act* aimed to reduce the relative incidence of insecure work, through Division 5 of Part 2-9 relating to fixed-term contracts. Further efforts to reduce the insecurity of work were made in subsequent legislation that also amended the FW Act. It is important, for the achievement of the objects of this legislation, that employer behaviour does not increase the insecurity of work.

While the nature of employer responses to these amendments is still to be fully observed, one aspect that can be observed and remedied is occurring in the higher education sector. There, at least two employers have moved casual teaching staff onto two-week contracts. Previously, most casual teaching staff had been employed on contracts lasting between 12 and 15 weeks, reflecting the length of university teaching periods ('semesters' or 'trimesters'). Since July 2024, fixed-term casual contracts of 12 to 15 weeks have been replaced by these contracts of two weeks' duration. The universities have done this, to circumvent a provision now in the FW Act (due to the 'Closing Loopholes' amendments) that provided that higher education employees on fixed-term contracts could not be classified as casuals. Relevant employers circumvent this by relying on the wording in the FW Act that focuses on employment contracts that 'include a term that provides the contract will terminate at the end of an identifiable period'.[41] Work is only offered for two weeks in these contracts, and the employee is advised to check with the employer two weeks later to see if work for the next two weeks will also be offered. It is a ruse to avoid the provisions of the Act, as the universities typically provide weekly tutorials for students for a whole teaching period, students are advised that these weekly tutorials will be available for the whole teaching period and are encouraged to enrol in one, and casual teaching staff are used to provide the weekly tutorials. Students expect that the weekly tutorials will be staffed and could reasonably expect that the same tutor will be in charge of the tutorial each week. The employer therefore knows that staff will be required for the tutorials each week through a teaching period. The pattern of work is predictable (at least for the employer), even if an attempt is made to turn it into unpredictable work for the employee by the threat of or actual rostering a different schedule for the next fortnight.

It could be argued that this attempt to circumvent the legislation would fail in a court of law, due to the operation of the general avoidance provisions in this Division. Still, there must be some uncertainty about this, otherwise the universities would not have been advised to try this approach.

Although this issue arises from the Closing Loopholes amendments to the FW Act, it has critical relevance for the SJBP legislation as well, as it is the mechanism by which most part-time teaching staff of universities might be excluded from the effects of the relevant protections in the SJBP Act

[39] President's statement, Modern Awards Review 2023-24 — Final Report, FWC.
[40] President's statement, Modern Awards Review, p. 2.
[41] FW Act s333K

(Division 5 of Part 2-9, ss 333E to 333L). If excluded, higher education employers would be able to continue to hire staff as 'permanent' casuals, for indefinite periods, in clear breach of the intention of the SJBP Act.

The solution would appear to be to amend s333E(1)(c) of the FW Act (within the section that sets out limitations on fixed-term contracts, a provision that excludes casual employees) by adding, after 'the employee is not a casual employee of the employer', the following words

> …or the employee would not be a casual employee under s15A(4) if their contract of employment had included a term that provides the contract will terminate at the end of an identifiable period.

Addressing the full implications of employer behaviour to attempt to avoid the full effects of the FW Act, in particular the Closing Loopholes amendments, would likely involve amendment to s15A(4)(a) (which could in turn render amendment to s333E(1)(c) unnecessary), but that would be outside the scope of this submission. We note a review of the fixed-term contract provisions of the *Higher Education Industry—Academic Staff—Award 2020* and the *Higher Education Industry—General Staff—Award 2020* is underway.

Workplace conditions and protections

The various SJBP amendments designed to improve workplace conditions and protections are highly appropriate. Amendments improving FWA provisions to support better work and care arrangements are essential to both gender equality and job security. However, the SJBP amendments to the FWA to strengthen employees' access to flexible work arrangements have not done enough to make the FWA flexible work provisions effective. The SJBP amendments to improve protections for victim survivors of sexual harassment and to enhance small claims procedures to enable unpaid entitlement recovery are very positive changes.

Flexible working arrangements and unpaid parental leave

The FW Act includes the right to request flexible working arrangements for certain groups of employees including those with caring responsibilities. The SJBP Act amendments were intended to strengthen the FW Act provisions that had proven to be ineffective, through including dispute resolution by the FWC and a requirement for employers to take additional steps when responding to a request. Early evidence on the outcomes of cases following the *SJBP* changes suggest the right to request provisions remain very limited.[42] In 2022 the Select Committee on Work and Care noted that evidence before the Committee suggested that more is needed beyond the *SJBP* reforms. Among other recommendations the Select Committee proposed that the right to request flexible working arrangements be extended to all employees to remove any stigma associated with the provision being seen to provide for a minority of workers.[43] These and the SJBP amendments designed to strengthen workers' rights in relation to requests for extensions to unpaid parental leave should be subject to full evaluation to assess their effectiveness, with a view to further strengthening the provisions.

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[42] FWC (2023) *Discussion Paper Job Security Modern Awards Review 2023–24,* FWC, para 69. https://www.fwc.gov.au/

[43] The Senate (2022) *Select Committee on Work and Care - Interim Report*, p. xi, Canberra, Parliament of Australia.

Sexual harassment

The SJBP Act included provisions to progress the implementation of the recommendations of the Australian Human Rights Commission's (AHRC's) *Respect@Work* inquiry. The SJBP amendments take important steps towards breaking down the historical, practical and symbolic siloing of labour law and anti-discrimination jurisdictions which have resulted in work-related regulators, like the Fair Work Ombudsman and work health and safety authorities, largely ignoring sexual harassment.[44] The SJBP amendments to the FWA include a prohibition on sexual harassment at work, a dispute resolution function for the FWC, and provisions for initiating civil proceedings if the dispute is not resolved at the FWC.[45] The provisions regarding applications for stop bullying orders previously incorporated in the FWA were also streamlined and included together with the other sexual harassment provision in Part 3-5A of the FWA[46].

The FWC has dealt with relatively few matters related to sexual harassment since the SJBP changes. In first three months from 6 March 2023, when the provisions came into effect, the FWC received 11 applications and, in 2023-2024, dealt with 87 applications.[47] To date there have been no reported arbitrated decisions and no applications for a civil remedy in the courts. The FWC President has recently acknowledged that the FWC is developing its practice in handling sexual harassment complaints.[48]

Providing redress for those who have experienced sexual harassment at work through labour law has a number of potential benefits when compared to the anti-discrimination route.[49] The fact that these matters are now in the FWA and can come before the FWC may assist in having sexual harassment treated as a more central work rights issue by employers, regulators and unions. For example, the Fair Work Ombudsman has had to increase its capability to address complaints regarding sexual harassment. Further, access to the FWC is generally quicker than access to an anti-discrimination tribunal.[50]

There are some limitations in the approach taken to address sexual harassment under the FWA that could be addressed. The FWA could be further amended to provide a positive duty on employers to eliminate and prevent sexual harassment, sex based harassment and a hostile work environment. The SJBP amendments do not include any focus on prevention. Whilst the FWA allows for collective claims to go forward, the issue is framed individually – "a person must not sexually harass another person"[51], and the obligation for raising the matter rests with the victims of sexual harassment.

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[44] Charlesworth S (2010) 'The Sex Discrimination Act: advancing gender equality and decent work?', in Thornton M (ed) *Sex discrimination in uncertain times*, Canberra, ANU Press.
Smith B (2011) What kind of equality can we expect from the Fair Work Act?, *Melbourne University Law Review*, 35(2): 545-577.
[45] FWA s.527D, s.527F, and s.527T respectively.
[46] FWA s.527J
[47] Fair Work Commission (2024) *Fair Work Commission Annual Report 2023-24* at pp.64, 66.
[48] Workplace Express (2024) FWC harassment jurisdiction fast, but AHRC provides greater sensitivity: Paper, Workplace Express., https://www.workplaceexpress.com.au/, 25 November.
[49] Chapman et al (2017) Substantive equality at work.
[50] There are currently lengthy delays for applications to the AHRC for matters under the SDA See Price et al (2024) *The Paradox of Choice: Examining the options for workplace sexual harassment claims and progress on the Respect@Work changes*, Canberra, Women's Legal Centre.
[51] FWA s.527D

There is no positive duty on employers to prevent sexual harassment under the FWA. Employers can be found to be vicariously liable.[52] However, this is now out of step with the positive duty on employers and persons conducting a business or undertaking (PCBU) to eliminate as far as possible sexual and sex based harassment contained in the Sex Discrimination Act (SDA).

A further discord with the SDA is that the FWC under Part 3-5A does not deal with claims of sex-based harassment or hostile work environment which can now be brought under the SDA. Given that issues of sexual harassment, gender or sex-based harassment, and the creation of a hostile work environment are often intertwined, this limitation could complicate the effective handling of claims.[53] In addition to sexual harassment, there should be capacity to bring disputes for sex or gender based harassment and a hostile work environment to the FWC to be addressed together.

Costs are also an issue. An advantage of progressing matters under the FWA is that this is generally a no-costs jurisdiction, meaning that each party bears their own costs. Under the SDA there are now greater protections for those who bring claims of discrimination or harassment to court following the passing of the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth)* in September 224. This amendment includes a requirement that if a claimant is successful the court must order the respondent to pay the costs of applicant. A similar provision could be made where matters arising under Part 3-5A of the FWA go to court.

Whilst not a matter that is dealt with in the SJBP Act, the momentum to limit the use of confidentiality clauses and Non-Disclosure Agreements (NDAs) in sexual harassment matters should be noted. Greater transparency regarding the practices associated with settling sexual harassment claims will lead to greater accountability. This accountability should be supported by legislative reforms that mandate minimum conditions. The Centre for Future Work has recently made a detailed submission to the Victorian Government Inquiry on Restricting Non-Disclosure Agreements (NDAs) in Workplace Sexual Harassment Cas*es*.[54]

Conclusion

In summary, we believe the Secure Jobs Better Pay amendments are generally highly appropriate but some changes are needed to improve the effectiveness of some provisions.

To date, the impacts of the bargaining reforms have been positive but modest. We have not observed negative consequences of the SJBP bargaining reforms, including that we are unaware of any evidence that productivity has or will be adversely affected by these changes. To be fully effective in meeting the objectives of the SJBP Act, additional amendments should aim to remove barriers and complexity that are limiting access to multi-employer bargaining.

The SJBP reforms designed to address gender inequality have already led to very positive changes in some low-paid female-dominated industries. Some amendments to these reforms could be considered to ensure their potential for systemic change is able to be realised. Reforms in other

[52] FWA s.527E

[53] Andrades C (2023) Using the Fair Work System to stamp out sexual harassment: new pathways created by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)), *Employment Law Bulletin*, 28(1).

[54] Centre for Future Work (2024) Submission to the *Victorian Government Inquiry on Restricting Non-Disclosure Agreements (NDAs) in Workplace Sexual Harassment Case*, Centre o Future Work at the Australia Institute. https://futurework.org.au/

areas require some strengthening, including those designed to improve access to flexible working arrangements.

We thank the Review Panel for consideration of this submission. We would be happy to provide any further information than might assist the Panel in their work.

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